had any role in or control over the decisions made with respect to Congress' employees." *Id.* at 29a-30a.

As its final basis for the dismissal of Petitioner's complaint, the district court stated as follows:

> Given the availability of FECA, the existence of possible other remedies outside of FECA, and the weight of persuasive authority suggesting that USPS employees may not use Bivens for constitutional claims arising out of the workplace, the Court concludes that a comprehensive remedial scheme outside of a Bivens action is available to Plaintiff. Following Bush, Chilicky, and Malesko, this Court - finds that the existence of an alternative remedial scheme for Plaintiff creates a "special factor" guarding against the imposition of a Bivens action against his supervisors at the USPS.

Id. at 37a-38a.

The district court thereupon dismissed Petitioner's complaint in its entirety. The Petitioner filed a timely appeal from the district court's ruling in that regard.

The Appellant Court, without issuing an opinion explaining its ruling, issued a judgment declaring that Petitioner's Bivens claims were precluded by FECA and to the extent that they were not, they were otherwise precluded by Title VII.

STATEMENT OF RELEVANT FACTS

Petitioner's Complaint Allegations

In the complaint initiating his lawsuit, the Petitioner alleged that on or about October 15, 2001, a letter addressed to Senator Tom Daschle was opened by one of his staffers and it was discovered to contain a white powder substance. That substance was determined to be anthrax. As a result of this discovery, Senator Daschle's staffers were immediately administered the drug Cipro and provided other appropriate medical care. In addition, shortly thereafter the House and Senate recessed, their buildings were closed and remedial activities were undertaken. Until the safety of the worker's on Capitol Hill could be reasonably assured, Capitol Hill workers were not required to report to work. Accordingly, no employees of the House or Senate contracted inhalation anthrax. App. 44a.

The Petitioner further alleged that the Respondents discovered that the letter found to be contaminated with anthrax and addressed to Senator Tom Daschle, had passed through the Brentwood Postal Facility on October 12, 2001, and that they further became aware of the approximate time that this letter passed through the facility and through which specific sorter it had passed. App. 45a .

Subsequently, on October 16, 2001, the Petitioner reported to work as usual. During his tour of duty, he was asked to read a safety bulletin to other Postal workers in which assurances were

given about the safety of the Brentwood facility. On Capitol Hill, medical personnel conducted nasal swabs of more than a thousand people and dispensed antibiotics. House leaders took the historic step of canceling floor action and then closed its office buildings. The Senate basically followed suit. The Petitioner left work at the end of his shift at 12:30 p.m. and headed home. By then he had developed a cough that was worsening. The next day, the Petitioner again reported to work as normal. The Respondents still had taken no action regarding the safety of the Petitioner or the other postal employees at the Brentwood facility. Again, the employees at the facility were assured of the safety of the Brentwood facility even though the Respondents had no basis at all to advance that position and even though the Petitioner and several of his colleagues were already infected by the anthrax that had been introduced into the Brentwood facility by the Daschle letter and were literally dying. When asked by postal employees about closing the Brentwood facility as a precaution, the Respondents first responded that closing the Brentwood facility was not an option because it would cost the Postal Service approximately $600,000.00 a day, and then once again falsely represented that there was no contamination in the Brentwood facility. App. 46a.

The Petitioner again reported to work as usual on October 18, 2001, although he had truly begun to feel ill. Ironically, he was tapped to set up a news conference for government officials, including the Respondents, to once more falsely assure the public of the alleged safety of the Brentwood facility. These false proclamations of a safe working

environment at the Brentwood facility had no basis in fact or science and were merely set forth so as not to panic the public and disrupt the mail in the nation's capitol. The workers at the Brentwood facility, and the Petitioner in particular, were deemed expendable. The Respondents had made a conscious decision to keep the workers at the Brentwood facility in the dark about the risks they faced as long as they could, in a misguided attempt to preserve their perceived integrity of the Postal Service. App. 47a.

Petitioner's condition had considerably worsened by October 19, 2001, and he had become quite concerned. Nonetheless, he reported to work as usual. Later that morning, he went to see the nurse at the Brentwood facility who referred him to his private doctor. The Respondents still took no action regarding worker's at the Brentwood facility. Subsequently that same day, Petitioner was preliminarily diagnosed with inhalation anthrax at Fairfax Inova Hospital. The initial diagnosis of inhalation anthrax was confirmed at approximately 7:00 a.m. on October 20, 2001. Even though Petitioner's diagnosis of inhalation anthrax was confirmed, and the Respondents were made aware of that fact almost immediately, they still made no efforts to warn postal employees at the Brentwood facility; they still made no effort to get antibiotics to the workers at the Brentwood facility; and they continued to refuse to close the Brentwood facility so as to assure that no other postal workers were infected. App. 47a-48a.

Approximately 24 hours later, the Respondents finally decided that the workers at the Brentwood facility deserved to be told the truth about the Petitioner being infected with inhalation anthrax as a result of his employment at the facility. It was not until the following day, October 22, 2001, that the Respondents abandoned their indifferent attitude toward the postal workers at the Brentwood facility, and did that which they should have done on October 15, 2001, which was to close the Brentwood Facility, and make antibiotics available to their employees. Unfortunately, by that time, Petitioner was in a hospital bed, where he would remain for about a month, desperately fighting for his life. For two of his friends, Joseph Curseen and Thomas Morris, the Respondents' admission came too late, they died of inhalation anthrax.

Additionally in his complaint, the Petitioner fully elaborated upon the radically different treatment afforded the Postal employees who are approximately 93% African American, and the Capitol Hill employees, whose ranks were less than 10% African American. In doing so, the Petitioner noted the stark contrast between the closing of the House and Senate Office Buildings and providing antibiotics to the subject employees, and the lies that were told to the Petitioner and other postal workers about the dangers they faced. App.51a.

In sum, Petitioner's complaint alleged intentional and deliberately indifferent conduct, that if proven, would constitute actions so shocking, and so outrageous, that it may be fairly said that they shock the contemporary conscience.

REASONS FOR GRANTING THE WRIT

A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE THESE IMPORTANT QUESTIONS OF LAW THAT HAVE NOT BEEN PREVIOUSLY RAISED BEFORE NOR SPECIFICALLY ADDRESSED BY THIS COURT

This Court has never ruled on the important questions of law raised by Petitioner's lawsuit, namely, whether a substantive due process *Bivens*-type action is maintainable where a plaintiff has alleged that the defendants intentionally misrepresented the hazards that he was facing on a daily basis and did subject him to severe bodily harm as a consequence thereof.

In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), this Court refused to create a substantive due process *Bivens*-type remedy for the denial of a statutory right. In *Schweiker*, the plaintiffs' social security disability benefits were improperly terminated. Although the plaintiffs disability benefits were eventually restored, the plaintiffs brought a substantive due process *Bivens*-type action against three policymakers who the plaintiffs alleged were responsible for the illegal policies that resulted in their benefits being terminated in the first place. This Court found that Congress had already enacted elaborate administrative and judicial remedies, including review of constitutional claims, for those who claimed that they were wrongfully denied social security disability benefits. *Id.* at 424-26. As a

result, this Court refused to create a new damages remedy. *Id.* at 429.

In *Schweiker*, however, this Court did not answer the question of whether a substantive due process *Bivens*-type action is maintainable where a plaintiff has alleged that the defendant intentionally acted in a way that exposed the plaintiff to a dangerous situation and did in fact cause serious and verifiable injury to the plaintiff. Such is the question presented in the instant case. For these reasons, the lower courts should have rejected Respondents' preclusion arguments based on *Schweiker*, 487 U.S. 412, and refused to dismiss Petitioner's substantive due process *Bivens*-type claims.

Although this Court has not directly addressed the question presented in the instant case, several U.S. district and appellate courts have addressed similar questions and answered in the affirmative. For instance, in *Grichenko v. USPS, et al.*, 524 F. Supp. 672, 676-78 (E.D.N.Y. 1981), *aff'd without opinion*, 751 F.2d 368 (2nd Cir. 1984), a USPS employee brought a procedural due process *Bivens*-type action against several USPS officials. The plaintiff alleged that the defendants violated his right to due process by failing to timely process his injury claim under the Federal Employees Compensation Act (hereinafter "FECA"), 5 U.S.C. § 8101, *et seq.* The defendants moved to dismiss the plaintiff's *Bivens* claim, arguing that the claim was preempted by FECA.

Petitioner's substantive due process claim alleges that Respondents, knowing the Brentwood facility was contaminated with anthrax, affirmatively and intentionally (1) lied to Petitioner and his co-workers to keep them working at the anthrax-contaminated facility; (2) and instructed Petitioner's supervisors to lie, give false safety briefings and not provide protective gear such as gloves or masks to Petitioner and his co-workers. These affirmative acts by Respondents created, enhanced and/or increased Petitioner's vulnerability to the danger of anthrax contamination in violation of his Fifth Amendment substantive due process rights under the State endangerment theory.

In January of 2001, some ten (10) months before the events that gave rise to this case, the appellate court adopted and established the contours of the State endangerment theory of recovery in the D.C. Circuit. *See Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001). The contours of the State endangerment theory are straightforward and clear: there must be an affirmative act by the defendants to create or increase the danger that resulted in harm to plaintiff and defendants' affirmative act must shock the conscious.

The contours of the State endangerment theory enunciated in *Butera* clearly incorporate the facts alleged in Petitioner's complaint - a series of affirmative, indifferent, and intentional acts of conscious shocking deceit that created or increased the danger of Petitioner's exposure to deadly anthrax contamination.

Moreover, the Petitioner has alleged in his complaint that he was deceptively misled into working in an environment by the Respondents because, as an African-American, he was deemed expendable by the Respondents who valued the "integrity" of the Postal Service and $600,000 a day in revenue more than his life. The discrimination alleged by the Petitioner is exactly akin to the discrimination which the children in the Washington, D.C. public schools were subjected to in the 1950's and which this Court in *Bolling v. Sharpe*, 347 U.S. 497 (1954), unequivocally outlawed. These Respondents lied to the Petitioner and his co-workers about the risks involved at the Brentwood Facility.

> The Fifth Amendment, . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concept of equal protection and due process, both stemming from our American ideal of fairness, are mutually exclusive. The "equal protections of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Bolling, *supra*. at 347 U.S. 499.

The Petitioner's claims in this case are pure and simple. Invidious discrimination was certainly

pled, and such discrimination is clearly violative of the equal protection component of the Due Process Clause of the Fifth Amendment. *Kwai Fun Wong v. U.S.*, 373 F.3d 952, 968 (9th Cir. 2004).

In upholding and further clarifying what was established in *Bivens*, this Court in *Butz v. Economou*, 438 U.S. 478 (1978), elaborated thusly:

> As we have said, the decision in Bivens established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official. As Mr. Justice Harlan, concurring in the judgment, pointed out, the action for damages recognized in Bivens could be a vital means of providing redress for persons whose constitutional rights have been violated. The barrier of sovereign immunity is frequently impenetrable. Injunctive or declaratory relief is useless to a person who has already been injured. "For people in Bivens' shoes, it is damages or nothing." 403 U.S. at 410.

Id. at 438 U.S. 505.

During the following term, this Court held in *Davis v. Passman*, 442 U.S. 228 (1979), that a cause of action and a damage remedy can be implied directly under the constitution when the Due Process Clause of the Fifth Amendment is violated. 442 U.S. at 234.

> Like the plaintiffs in *Bolling v. Sharpe*, supra, the petitioner rests her claim directly on the Due Process Claim of the Fifth Amendment. She claims that her rights under the Amendment have been violated and that she has no effective means other than the judiciary to vindicate these rights. We conclude therefore, that she is an appropriate party to invoke the general federal - question jurisdiction of the District Court to seek relief. She has a cause of action under the Fifth Amendment.

Id. at 442 U.S. 243-44.

Subsequently, in *Correctional Service Corporation v. Malesko*, 534 U.S. 61 (2001), this Court fully clarified its holding in Bivens regarding the liability of federal officials:

> In the decade following Bivens, we recognized an implied damages remedy under the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1978), and the Cruel and Unusual Punishment Clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980). In both Davis and Carlson, we applied the core holding of Bivens, recognizing in limited circumstances a claim for money damages against federal officers who abuse their constitutional authority. In Davis, we inferred a new right of action chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation. 442 U.S. at 245 ("For Davis, as for Bivens, it is damages

> or nothing."). In Carlson, we inferred a right of action against an individual prison officials where the plaintiff's only alternative was a Federal Tort Claims Act (FTCA) claim against the United States. 446 U.S. at 18-23. We reasoned that the threat of suit against the United States was insufficient to deter the unconstitutional acts of individuals.

Id. at 534 U.S. 67-68.

Petitioner has alleged deliberate conduct of a despicable nature that was deemed acceptable because any potential victims of such determinations, in all likelihood would be African-American. That conduct, if proven, clearly would constitute a deprivation of Petitioner's rights to equal protection under the due process clause of the Fifth Amendment.

As this Court made clear in *Malesko*, *supra*.

> The purpose of Bivens is to deter individual federal officers from committing constitutional violations.

Id. at 70.

In *FDIC v. Meyer*, 510 U.S. 471 (1974), a unanimous Court made clear that

> Here, Meyer brought precisely the claim that the logic of Bivens supports - a Bivens claim for damages against Pattutlo, the FSLIC employee who terminated him.

Meyer, supra, at 510 U.S. 485.

Furthermore, it is all too clear that FECA provides no remedy to this Petitioner. Under FECA itself, its exclusivity provisions only apply to "the United States or an instrumentality thereof." 5 U.S.C. § 8101(1)(a) is clear that instrumentality and employees are quite different. As the Respondents, who are employees of the United States Postal Service, are not instrumentalities thereof, that statute does not preclude Petitioner's lawsuit. As this Court noted in *Carlson v. Green*, supra,

> Bivens established that the victim of a constitutional violation by a federal agent has a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counseling hesitation in the absence of affirmative action by Congress." The second is when defendants show that Congress has provided an alternative remedy which is explicitly declared to be a substitute for recovery directly under the constitution and viewed as equally effective. [citations omitted]

Id. at 18-19. Neither of the two situations exists here. To be sure, there was no basis for a determination that the FECA precludes Petitioner's Bivens claim as set forth herein.

Insofar as Title VII is concerned, the Petitioner's allegations regarding race have nothing to do with hiring or firing or promotions or transfers or anything of that nature. Petitioner's allegations regarding race are premised on the fact that but for the racial composition of the Brentwood Facility - 93 % African-American - these Respondents would not have lied. They would have told the workers the truth, which was that there was no scientific basis upon which to rely to support the proposition that anthrax spores could not escape a sealed envelope. And but for the racial composition of the Brentwood facility - 93% African-American - the Respondents would have put the lives of the workers first, just as was done, on Capitol Hill where the workforce's racial composition is starkly different. As such, Petitioner plainly set forth a Fifth Amendment Equal Protection claim as opposed to a claim under Title VII.

Under Title VII, a claim to be cognizable, must allege an unlawful employment practice. 42 U.S.C. § 2000e-5. The Petitioner alleged nothing that could be deemed an unlawful employment practice as set forth in 42 U.S.C. § 2000e-2 and 42 U.S.C. § 2000e-3.

Accordingly, Title VII, 42 U.S.C. § 2000e-16, is wholly inapplicable to Petitioner's lawsuit, and therefore, no basis for its application to the case at bar was warranted. Indeed, contrary to the appellate court's position, *Brown v. Gen. Serv. Admin.*, 425 U.S. 820 (1976), only confirms the inapplicability of Title VII to the situation at hand:

> Section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1970 ed., Supp. IV), proscribes federal employment discrimination and establishes an administrative and judicial enforcement system. Section 717(a) provides that all **personnel action** affecting federal employees and applicants for federal employment "shall be made free from any discrimination based on race, color, religion, sex, or national origin." Emphasis added.

Brown, supra., at 425 U.S. 829.

What occurred here was not a "personnel action." It was instead discriminatory action that was deemed acceptable solely because of the racial makeup of the workforce. In other words, it was the modern day version of the "separate but equal" hypocrisy that was outlawed many years ago.

CONCLUSION

A substantive due process *Bivens*-type remedy is maintainable where a plaintiff has alleged intentional acts of misconduct by government officials, which clearly put a plaintiff in a position of harm which, in fact occurred, and where suit seeks redress from the government officials in their individual capacities as opposed to their official capacities. As such, Petitioner respectfully requests that his petition for writ of certiorari be granted to resolve the important questions of federal law herein set forth that have not been, but should be, settled by this Court.

Respectfully submitted,

Ted J. Williams
Gregory L. Lattimer
Elmer D. Ellis
1100 H Street, N.W.
Suite 920
Washington, DC 20005
(202) 638-0095

Counsel for Petitioner

APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5403 **September Term, 2005**

03cv00018

Filed On:
Nov 7 2005

Leroy Richmond,
Appellant

v.

John Jack Potter, *a/k/a* Jack Potter,
Individually as Postmaster General of the
U.S. Postal Service, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
No. 03cv00018

BEFORE: SENTELLE, TATEL, and GARLAND, *Circuit Judges.*

[ENTERED: November 7, 2005]

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia, and on the briefs of the parties and oral arguments by counsel. The court has determined

that the issues presented occasion no need for an opinion. See D.C. Cir. Rule 36(b).

Plaintiff-Appellant claims various officials at the United States Postal Service (USPS) violated his rights under the "substantive due process" and "equal protection" components of the Fifth Amendment. Specifically, the complaint alleges that the defendants intentionally misrepresented the safety of USPS's Brentwood Processing and Distribution Center in Washington, D.C., where Richmond was working when he contracted inhalation anthrax in October 2001. Relying on *Bivens v. Six Unknown Named Fed. Narcotics Agents,* 403 U.S. 388 (1971), Richmond claims the USPS officials' conduct was outrageous and constituted racial discrimination, making them personally liable for money damages. The District Court dismissed Richmond's complaint pursuant to Fed. R. Civ. P. 12(c).

We conclude Richmond's *Bivens* claims are precluded by an "elaborate, comprehensive scheme" that Congress has provided to govern employees' injuries in federal workplaces. *Bush v. Lucas,* 462 U.S. 367 (1983); *see also Schweiker v. Chilicky,* 487 U.S. 412, 424-25 (1988). Under the Federal Employees Compensation Act (FECA), the government must "pay compensation . . . for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty." 5 U.S.C. § 8102(a). FECA provides the exclusive remedy for Richmond's injuries. *See Johansen v. United States,* 343 U.S. 427, 439-40 (1952) (FECA is the "exclusive right to Government

employees for compensation, *in any form,* from the United States. . . . [FECA's] comprehensive plan for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive.") (emphasis added). Moreover, to the extent FECA does not cover Richmond's racial discrimination claim, Title VII of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of racial discrimination in federal employment. *See Brown v. Gen. Servs. Admin.,* 425 U.S. 820, 835 (1976), It is therefore

ORDERED AND ADJUDGED that the District Court's dismissal of the complaint is affirmed.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc. See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LEROY RICHMOND,

Plaintiff,

v. Civil Action No. 03-00018 (CKK)

JOHN "JACK" POTTER, *et al.*,

Defendants.

MEMORANDUM OPINION

[ENTERED: September 30, 2004]

(September 30, 2004)

Plaintiff Leroy Richmond brought this action for monetary relief pursuant to the Equal Protection component of the Fifth Amendment's Due Process Clause, U.S. Const., amend. V, for the anthrax-related injuries he incurred while employed at the United States Postal Service's Brentwood Facility during October 2001. Citing deliberate, racially-motivated callousness, Plaintiff asserts that Defendants John ("Jack") Potter, Postmaster General of the United States Postal Service, Timothy Haney, Plant Manager at the Brentwood Facility, and Paulette Collette, allegedly Postmaster of the

District of Columbia,[1] chose profits over human lives by keeping the Brentwood Facility open for nearly seven days after they had knowledge that the facility had been contaminated by an anthrax-filled letter destined for the offices of Senator Tom Daschle. As a result of this purportedly "deliberately indifferent" attitude to the safety of the Brentwood Postal workers, Plaintiff asserts two claims against Defendants: (1) Defendants' concealment of the danger of infection at the facility violated the protections of life, safety and personal security inherent in the Fifth Amendment; and (2) the disparate treatment given to the largely African-American workforce at the Brentwood Facility vis-á-vis the largely white Capitol Hill employees constituted a violation of the Fifth Amendment's Equal Protection guarantees.

In response, Defendants introduced a Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c), to which Plaintiff has filed an Opposition and Defendants have offered a Reply. Considering the totality of these motions and

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[1] Plaintiff identifies "Paulette Collette" as "at all times relevant herein, the Postmaster for Washington, D.C. with direct responsibility for the Brentwood Postal Facility." First Am. Compl. ¶ 6. Defendants have presented uncontested evidence that Delores Killette, who was not named in this action, was Postmaster of Washington, D.C., during this time period. Defs.' Mot. for Summ. J. at 3 n.3; Defs.' Reply at 1 n.1. Apparently, there exists no record of a Postal Service official named "Paulette Collette." *Id.* Because she has been neither named nor served, Ms. Killette is not a party to this action; because she is an apparent non-entity with whom service is specious at best, "Ms. Collette" is hereby dismissed as a defendant from this suit.

the relevant caselaw, the Court shall grant Defendants' Motion and dismiss Plaintiff's First Amended Complaint.[2]

I: BACKGROUND

For the purposes of this motion, the Court accepts as true the following relevant and material facts that the Plaintiff has proffered. Plaintiff Leroy Richmond was employed by the United States Postal

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[2] Defendants have consistently maintained that "Plaintiff has yet to perfect service and thereby acquire jurisdiction *in personam* over the individual defendants." Defs.' Mot. for J. on the Pleadings at 13; *see also* Defs.' Opp'n to Pl.'s Mot. for Default J. at 1-2. According to Defendants, Plaintiff has failed to provide service in accordance with Federal Rule of Civil Procedure 4(i), which governs service of process on federal officials in both their individual and official capacities. *Id.*

"The party on whose behalf service is made has the burden of establishing its validity when challenged; to do so, he must demonstrate that the procedure employed satisfied the requirements of the relevant portions of Rule 4 and any other applicable provision of law." *C. Wright & A. Miller* § 1083, at 12 (1987). A review of the requirements of Rule 4(i) and the Return of Service/Affidavit of Summons and Complaint Executed filed by Plaintiff demonstrates significant problems with Plaintiff's service of process. Indeed, a deficiency in service likely led to Plaintiff's "Paulette Collette" error.

In response to Defendants' contentions, Plaintiff argues "[t]o the extent that service is deemed not to have been perfected, the plaintiff submits that dismissal is inappropriate and would serve no useful purpose other than to delay this matter." Pl.'s Opp'n at 22. Because the Court finds that Plaintiff has not articulated a cognizable claim against Defendants, the Court agrees that service-related dismissal would "serve" no useful purpose. Therefore, the Court shall consider this point moot.

Service at its Brentwood Postal Facility during the Fall of 2001. First Am. Compl. ¶ 8. It was during this time that letters containing a white powdered substance later determined to be inhalation anthrax were mailed to the offices of various governmental officials. One such letter containing anthrax was addressed to Senator Tom Daschle and was opened by his staffers on October 15, 2001. *Id.* ¶ 7. As a result of this discovery, Senator Daschle's staffers were given the prescription antibiotic Ciprofloxacin Hydrochloride ("Cipro") and provided other appropriate medical care. *Id.* Thereafter, the United States House of Representatives and Senate recessed, their respective buildings were closed, and remedial activities were promptly undertaken. *Id.* On October 16, 2001, medical personnel conducted nasal swabs of more than one thousand Capitol Hill workers and dispensed antibiotics. These safety precautions proved effective, as no employees of the House or Senate contracted inhalation anthrax. *Id.*

Upon investigation, Defendants discovered that the Daschle letter had passed through the Brentwood Postal Facility on October 12, 2001. *Id.* ¶ 8. In addition, this inquiry revealed both the approximate time the Daschle letter passed through the facility and through which specific sorter it traveled. *Id.* Despite this knowledge, Defendants did not close the Brentwood Facility until October 22, 2001 -- roughly seven days after the discovery of the Daschle letter. *Id.* ¶ 14. During this seven day interim, Defendants and other government officials continued to assert that the Brentwood Facility was free from contamination, *id.* If 10, via (1) an October 16, 2001, bulletin to Postal workers in which

assurances were given about the safety of the Brentwood Facility, *id.* ¶ 9; (2) conversations with Postal officials held on October 17, 2001, in which employees were told that there was no contamination at the facility, and that closing the facility was not an option due to potential losses of "$600,000,000.00 a day,"[3] *id.* ¶ 10; and (3) an October 18, 2001, news conference in which Postal officials -- including Defendants -- assured the public of the safety of the Brentwood Facility, *id.* ¶ 11.

Plaintiff Richmond's condition rapidly deteriorated during this interim, following this timeline:

- By the end of his October 16, 2001, shift, which concluded at 12:30 P.M., Richmond had developed a cough that was worsening. *Id.* ¶ 9.

- On October 18, 2001, Plaintiff began showing signs of a significant illness. *Id.* ¶ 11.

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[3] Plaintiff is inconsistent as to the potential daily losses that the Postal Service would have incurred as a result of the closure of the Brentwood Facility. Plaintiff cites to the $600,000,000.00 figure in his Complaint, First Am. Compl.¶¶ 10, and in parts of his Opposition to Defendants' Motion to Dismiss, Pl.'s Opp'n at 2, 8. However, in other sections of his Opposition, Defendant cites to a figure of $600,000 a day. *Id.* at 3, 17, 19.

- During the morning of October 19, 2001, Plaintiff Richmond's condition was so troublesome that he saw a nurse at the Brentwood Facility. The nurse then referred Richmond to his private doctor, whom he saw later that same day. *Id.* ¶ 12.

- During the evening of October 19, 2001, Plaintiff was preliminarily diagnosed with inhalation anthrax at Fairfax Inova Hospital. *Id.*

- Plaintiff's initial diagnosis of anthrax infection was confirmed at approximately 7:00 A.M. on October 20, 2001. *Id.*

- Plaintiff remained in the hospital for nearly one month due to injuries caused by inhalation anthrax. *Id.* ¶ 15.

Plaintiff alleges that despite the Defendants' almost immediate awareness of his diagnosis, Defendants made no effort to get antibiotics to the workers at the Brentwood Facility and continued to refuse to close the Brentwood Facility. *Id.* ¶ 13. Plaintiff contends that it was not until October 21, 2001, that Defendants made a decision to close the Facility and provide Postal workers with antibiotics — a determination that was not implemented until October 22, 2001. *Id.* ¶ 14. Two Brentwood Postal employees, Joseph Curseen and Thomas Morris, subsequently died as a result of inhalation anthrax. *Id.* ¶ 15.

The gravamen of Plaintiff's Complaint is that Defendants acted with "conscious shocking deliberate indifference" to the rights and lives of Plaintiff and other Brentwood Facility employees by subjecting them to "known, substantial risk of serious harm." *Id.* ¶ 21. Plaintiff contends that Defendants mounted a series of "false representations, baseless representations and self-serving representations" in order to keep the Facility open despite knowledge of probable anthrax contamination in order to both save face and preserve the Postal Service's revenue stream. *Id.* ¶¶ 10-11, 22. Plaintiff further maintains that this "conscious" decision by Defendants to keep Brentwood workers "in the dark" was not motivated simply by profit or public appearance. *Id.* ¶¶ 11, 29.[4] Rather, workers at the Brentwood Facility were "93% African American and deemed expendable by the defendants." *Id.* ¶ 29. According to Plaintiff, "the workforce of the United States House of Representatives is less than 10% African American," Id.; as such, "immediate action was taken to assure the safety of the workers in the House and Senate." *Id.* The largely African-American workforce of the Brentwood Facility was, however, subjected to "outrageous" and "despicable disparate treatment" due to race-based indifference. *Id.* ¶ 30.

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[4] The First Amended Complaint contains two paragraphs numbered "29." Both paragraphs make a race-based comparison between the treatment of Capitol Hill workers and Brentwood Facility workers. As such, the Court will treat the two paragraphs as one for the purposes of this motion, and any reference to "First Am. Compl. ¶ 29 " includes both.

Plaintiff Richmond concludes by alleging that Defendants' actions caused the near-loss of his life, "extreme and horrific pain and suffering, severe emotional distress, mental anguish, embarrassment, and humiliation." *Id.* ¶¶ 23, 31. Due to these incurred injuries, Plaintiff requests "the full and fair amount of Fifty Million Dollars ($50,000,000.00) plus interests and costs." *Id.* Plaintiff bases his right of recovery on two separate but related constitutional claims: (1) Defendants' false representations and concealment of the contamination danger violated the Fifth Amendment's guarantees of life, safety and personal security, *Id.* ¶¶ 16-23, and (2) Defendants' disparate, race-based treatment of the Brentwood Facility workers violated the Equal Protection component of the Fifth Amendment's Due Process Clause. *Id.* ¶¶ 24-31.

II: LEGAL STANDARD

Rule 12(c) of the Federal Rules of Civil Procedure provides that "[a]fter the pleadings are closed but within such time frame as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The standard of review for motions for judgment on the pleadings under Rule 12(c) is essentially the same as that for motions to dismiss under Rule 12(b)(6). *Haynesworth v. Miller,* 820 F.2d 1245, 1254 (D.C. Cir. 1987); *Transworld Products Co. v. Canteen Corp.,* 908 F. Supp. 1, 2 (D.D.C. 1995). On either motion, the Court may not rely on facts outside of the pleadings and must construe the Complaint in the light most favorable to the non-moving party. *See Kowal v. MCI Communications Corp.,* 16 F.3d 1271, 1276 (D.C.

Cir. 1994). Accordingly, at this early stage in the proceedings, the Court assumes the veracity of all factual allegations set forth in Plaintiff's Complaint. *See Doe v. U.S. Dep't of Justice,* 753 F.2d 1092, 1102 (D.C. Cir. 1985).[5]

Granting judgment on the pleadings pursuant to Rule 12(c) or a motion to dismiss for failure to state a claim under Rule 12(b)(6) is warranted only if it appears beyond doubt, based on the allegations contained in the complaint, that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Alicke v. MCI Communications Corp.,* 111 F.3d 909, 912 (D.C. Cir. 1997). "The complaint must be 'liberally construed in favor of the plaintiff,' who must be granted the benefit of all inferences that can be derived from the facts alleged." *Schuler v. United States,* 617 F.2d 605, 608 (D.C. Cir. 1979) (citation omitted).

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[5] Defendants, in their Reply Memorandum, blatantly contest many of Plaintiff's factual assertions present in the Complaint. *See* Defs.' Reply at 3 n.3. Indeed, while Defendants proclaim affinity with the practice that "the defendants' motion challenges only the legal sufficiency of plaintiff's pleadings at this stage and this Court may not consider facts outside the complaint in deciding this motion," they then seek to put Congressional testimony in front of the Court and "flatly deny that they had prior knowledge of the danger." *Id.* While Defendants might take solace in Oscar Wilde's maxim "The well-bred contradict other people. The wise contradict themselves.", the Court notes that it would not be wise at this stage to consider any factual assertions beyond Plaintiff's pleadings. Oscar Wilde, "Phrases and Philosophies for Use of the Young," *The Chameleon* (1894). Any contradictory information proffered by Defendants is hereafter ignored for the purposes of this Memorandum Opinion.

However, while the Court must construe the Complaint in the Plaintiff's favor, it "need not accept inferences drawn by the plaintiff[] if such inferences are not supported by the facts set out in the complaint." *Kowal,* 16 F.3d at 1276. Moreover, the Court is not bound to accept the legal conclusions of the non-moving party. *See Taylor v. FDIC,* 132 F.3d 753, 762 (D.C. Cir. 1997).

III: DISCUSSION

Although unstated in his Complaint, Plaintiff's suit rests upon an implied private action for damages against federal officers alleged to have violated his constitutional rights. Pl.'s Opp'n at 6. In order to recover under this implied private action, first recognized by the Supreme Court in *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), Plaintiff must meet three criteria: (1) the suit must name the relevant federal officials in their "individual capacities," (2) the injury asserted must qualify as a fundamental constitutional right that was clearly established at the time of the alleged violation in order to overcome "qualified immunity," and (3) there must be "no special factors counseling hesitation in the absence of affirmative action by Congress." *See id.* at 395-96; *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 66-70 (2001); *Dodge v. Trustees of Nat'l Gallery of Art,* 326 F. Supp. 2d 1, 12 (D.D.C. 2004) (Lamberth, J.). Upon an analysis of Plaintiff's Complaint under each of these criteria, the Court concludes that Plaintiff's claim fails to meet the stringent standards necessary to maintain a *Bivens* action.

A. Defendants Must Be Sued in Their Individual Capacity

The Supreme Court's decision in *Bivens* to create an implied private right of action against government officials in their individual capacities was -- in part -- a reaction to the concern that a direct action against the Government was otherwise unavailable. *Bivens,* 403 U.S. at 410 (Harlan, J., concurring in judgment). As described by Justice Harlan, "[h]owever desirable a direct remedy against the Government might be as a substitute for individual officer liability, the sovereign still remains immune to suit. . . For people in Bivens' shoes, it is damages or nothing." *Id.* The very purpose *of Bivens,* then, is to provide a remedy where none was available and " to deter individual federal officers from committing constitutional violations." *Malesko,* 534 U.S. at 70. The Supreme Court made clear in *FDIC v. Meyer,* 510 U.S. 471 (1994), that the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity, *id.* at 474, are indemnified by the employing agency or entity, *id.* at 486, or are acting pursuant to an entity's policy, *id.* at 473-474.

Because a *Bivens* remedy is focused exclusively on deterring the conduct of federal officers, the Supreme Court has refused to imply a damages action directly against federal agencies, *Meyer,* 510 U.S. at 485, and against a private corporation acting under color of state law, *Malesko,* 534 U.S. at 71-72. Therefore, absent express authorization from Congress, *Bivens* -- by focusing

on the federal officer as an individual, not instrument of the government -- is an important route around issues of sovereign immunity in this context. Plaintiffs must focus in their pleadings on the official as an "individual" in order to assuage fears that *Bivens* could be wrongfully extended past its core premise.

Plaintiff Richmond has sued Defendants Potter and Haney in their individual capacity, and thus has met the first criteria of the three-pronged *Bivens* test. Plaintiff was a bit unclear regarding the capacity in which he was suing Defendants in his original Complaint, as he listed Defendants as being sued in their "official and individual capacities," Compl. ¶¶ 4-5, but included a handwritten note under the caption that each defendant was sued in their "individual capacity only," *id.* at 1. Plaintiff's First Amended Complaint, which is now controlling, clearly corrects this error and simply lists each Defendant as being sued "in his individual capacity." First Am. Compl. ¶¶ 4-5. As such, Plaintiff has escaped possible problems that may have arisen under sovereign immunity and the *Malesko* and *Meyer* rulings.

B. Qualified Immunity

Plaintiff Richmond's ability to meet the three-pronged *Bivens* test becomes quite a bit murkier when faced with the second prong -- qualified immunity. The Supreme Court has provided government officials with qualified immunity from suits for damages to "shield[] them from undue interference with their duties and from potentially

disabling threats of liabilities." *Harlow v. Fitzgerald,* 457 U.S. 800, 806 (1982) (citing *Nixon v. Fitzgerald,* 457 U.S. 731 (1982)). Qualified immunity serves not merely as a defense but also an immunity from the burdens of litigation. *Saucier v. Katz,* 533 U.S. 194, 201 (2001); *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). Immunity questions must therefore be resolved "at the earliest possible stage in litigation" because if a case is erroneously permitted to go to trial and the defendant must "face [any] burdens of litigation," the value of qualified immunity is lost. *Id.*

The qualified immunity determination requires a two-step analysis. First, the Court must evaluate whether Plaintiff has been deprived of an actual constitutional right.[6] In other words, the Court is directed to ask: "Taken in the light most favorable to the party asserting the inquiry, do the facts alleged show the officer's conduct violated a constitutional right?". *Saucier,* 533 U.S. at 201 (citing *Siegert v. Gilley,* 500 U.S. 226, 232 (1991)). In delineating the parameters of this constitutional right, the Court must avoid defining "the relevant constitutional right in overly broad terms, lest [it] strip the qualified immunity defense of all meaning."

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[6] As the *Bivens* court made clear, a plaintiff must be claiming the violation of a fundamental *constitutional* right in order to maintain a *Bivens* action. *Bivens,* 403 U.S. at 392. Defendants seeking shelter from a *Bivens* action underneath the sympathetic umbrella of qualified immunity must prove that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow,* 457 U.S. at 818.

Butera v. District of Columbia, 235 F.3d 637, 646 (D.C. Cir. 2001).

Second, if Plaintiff's case passes muster under this initial inquiry, then the Court must examine whether this right was "clearly established" such that a reasonable officer would have been aware that his conduct was unlawful. *Saucier,* 533 U.S. at 202; *see Wilson v. Layne,* 526 U.S. 603, 615 (1999) (same). The actions of the official should be "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton,* 483 U.S. 635, 638 (1987) (citing *Harlow,* 457 U.S. at 819). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson,* 483 U.S. at 640. If the federal official was not on notice that his conduct would clearly be unlawful, dismissal based on qualified immunity is appropriate. *Saucier,* 533 U.S. at 202 (citing *Malley v. Briggs,* 475 U.S. 335, 341 (1986) ("qualified immunity protects 'all but the plainly incompetent or those who knowingly violated the law'")).

Although the specific action in question need not have been explicitly deemed unlawful by the courts, its unlawfulness in light of pre-existing law must have been apparent to Defendants. *Anderson,* 483 U.S. at 640; *Butera,* 235 F.3d at 646. Since permitting damages against government officials can entail substantial social costs, the right in question must be defined with a reasonable degree of particularity. *Anderson,* 483 U.S. at 640. Importantly, "bare allegations of malice should not subject government officials either to the costs of

trial or the burdens of broad reaching discovery." *Harlow,* 457 U.S. at 817-18. Absent a showing that Plaintiff's allegations constitute a violation of a "clearly established" right, the federal officials are entitled to judgment without need for fact discovery. *Id.*

1. Plaintiff's 5th Amendment Life, Safety and Personal Security Claim

a. Was the Alleged Deprivation a Constitutional Violation?

The crux of Plaintiff's first claim is that Defendants acted with "conscious shocking deliberate indifference to the rights of plaintiff in subjecting him to the known, substantial risk of serious harm, and specifically death." First Am. Compl. ¶ 21. According to Plaintiff Richmond, the Defendants' series of "false representations" concealed the danger at the Brentwood Facility, and placed the lives, safety and personal security of himself and the other Brentwood workers in jeopardy. *Id.* ¶ 22. While not necessarily explicit in Plaintiff's Complaint, *see id.* ¶ 19, it is relatively clear that Plaintiff is asserting a substantive due process violation. Claims of substantive due process violations by State officials are generally analyzed under the Due Process Clause of the Fourteenth Amendment, which provides that "[n]o State shall. . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *Butera,* 235 F.3d at 646 n.7. While the federal officials named by Plaintiff are not state actors under the Fourteenth Amendment, they are subject

to the Due Process Clause of the Fifth Amendment, which also states that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V; *see Bolling v. Sharpe,* 347 U.S. 497, 499 (1954).

Defendants' seek to transform Plaintiff's argument from a substantive due process claim into one concerning a simple right to workplace safety. Citing to a key passage in *Collins v. City of Shaker Heights,* 503 U.S. 115 (1992), Defendants forward the argument that "[n]either the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause." *Id.* at 126. Defendants assert that "while the failure to correct known unsafe conditions may have violated a tort law duty, it did not deprive plaintiff of liberty within the meaning of the Due Process Clause." Defs.' Reply at 6 (citing *Washington v. District of Columbia,* 802 F.2d 1478, 1482 (D.C. Cir. 1986) ("Whatever appellant's rights may be under state law, he has no constitutional right to a safe working environment.")). As such, Defendants conclude that Plaintiff's First Count must be dismissed for failing to prove a constitutional violation. *Id.*

Despite their best efforts, Defendants' Procrustean endeavor to gloss over the subtle law in this area fails to cover all of the relevant cracks, and their position wrongly simplifies a rather complex body of law. It must be noted that Plaintiff's scant response fails to pick up on this complexity: Plaintiff

neglects to adequately distinguish *Collins* -- only focusing on the failure of the *Collins* petitioner to allege wilful, deliberate conduct -- and he forwards no cases affirmatively in his favor. Pl.'s Opp'n at 19-20. However, in order to ensure a proper adjudication, it is the Court's responsibility to investigate the body of law that has developed in the wake of *DeShaney v. Winnebago County Dep't of Social Services,* 489 U.S. 189 (1989). Rather than the simple world painted by Defendants, *DeShaney* and its progeny have introduced a "State endangerment concept" that courts must grapple with when faced with claims similar to those brought by Plaintiff. *Butera,* 235 F.3d at 651.

Collins itself is one of these post-*Deshaney* decisions, and Defendants mischaracterize the *Collins* holding as precluding all suits alleging constitutional violations resulting from unsafe workplace conditions. *Collins* stands for nothing of the sort; rather, in *Collins,* the plaintiff -- the wife of a deceased city sanitation worker -- advanced two theories: that the city had a constitutional obligation to provide a safe workplace, and that the city's "deliberate indifference" to her husband's safety was arbitrary government action. *Collins,* 503 U.S. at 125-26. "Rejecting the first theory out of hand, the Court then held that the plaintiff had not sufficiently alleged arbitrary government action that would shock the conscience." *Estate of Phillips v. District of Columbia,* 257 F. Supp. 2d 69, 78 (D.D.C. 2003) (citing *Collins,* 503 U.S. at 126). Therefore, *Collins* "does not suggest that a government employee may never assert a substantive due process claim against his or her employer." *Id.* Instead, if a plaintiff does

adequately allege government action in the workplace that would shock the conscience, a case may proceed. *Id.*

This Circuit in *Butera* expanded on this distinction present in *Collins*: "[A]n individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase the danger that ultimately results in the individual's harm." *Butera,* 235 F.3d at 651. However, the *Butera* court cautioned that "[t]o assert a substantive due process violation, the plaintiff must also show that the District of Columbia's conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Id.* (quoting *County of Sacremento v. Lewis,* 523 U.S. 833, 847 n.8 (1998)). *Butera* created a "shocks the conscience" test whose application varied depending on the circumstances of plaintiff. *Id.* This test is controlling for the purposes of Plaintiff's substantive due process claim.

Two levels of behavior might reach "conscience-shocking" status and justify recovery for a plaintiff. *Id.* First, "behavior at the [] end of the culpability spectrum that would most probably support a due process claim" is intentional "conduct intended to injure in some way unjustifiable by any government interest." *Id.* (citing *Sacramento,* 523 U.S. at 849, 854 (holding that in the context of a high-speed chase by police officers that accidentally killed a fleeing motorcyclist, the plaintiff must satisfy the higher "intent to harm" standard to prove that the officers' behavior was conscience-shocking)).

Second, conduct that is "something more than negligence but less than intentional conduct, such as recklessness or gross indifference," may also reach "the point of conscience shocking." *Id.* (citing *Sacremento,* 523 U.S. at 849). Admittedly, this second, lower standard -- which covers "deliberate indifference" -- "is a matter for closer calls." *Id.* As such, a plaintiff can prove that "deliberate indifference" "shocks the conscience" *"only in 'circumstances where the State has a heightened obligation toward the individual.'" Fraternal Order of Police v. Williams,* 375 F.3d 1141,1146 (D.C. Cir. 2004) (citing *Butera,* 235 F.3d at 651) (emphasis added).

Plaintiff does not allege that Defendants intentionally caused him and his fellow co-workers harm; rather, Plaintiff Richmond specifically alleges "conscious shocking deliberate indifference." First Am. Compl. ¶ 21. As such, he actually passes the *Collins* standard for dismissal by actually alleging that the Defendants' actions "shocked the conscience" and rose above mere negligence. However, Plaintiff must still show that he meets the *Butera* standard, which outlines when deliberate indifference can "shock the conscience." As noted above, Plaintiff can only meet this standard by asserting that he was injured by the deliberate indifference in "circumstances where the State has a heightened obligation to the individual." *Butera,* 235 F.3d at 651; *see Sacramento,* 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process

demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.").

Unfortunately for Plaintiff, he has failed to allege the necessary "heightened circumstances"; moreover, such an allegation based on his situation would likely not be sustainable. Importantly, this Circuit has held that "[t]he opportunity for deliberation alone is not sufficient to apply the lower threshold to substantive due process claims." *Fraternal Order of Police,* 375 F.3d at 1146. Instead, it is "'[b]ecause of... special circumstances' like custody that 'a State official's deliberate indifference . . . can be truly shocking.'" *Id.* (quoting *Butera,* 235 F.3d at 652). Courts have proved extremely hesitant to expand special, "heightened circumstances" outside the context of *actual custody. See, e.g., Collins,* 503 U.S. at 1069-70 (Due Process requires confinement against an individual's will, and does not cover voluntary acceptance of employment); *Fraternal Order of Police,* 375 F.3d at 1146-47 (dangers posed to correctional officers due to overcrowding and a shortage of guards did not constitute special circumstances); *Washington,* 802 F.2d at 1479 (same); *Butera,* 235 F.3d at 651 n.16 (noting but not deciding "whether the possibly voluntary nature of [undercover police operative's] conduct would relieve or mitigate [sic] the District of Columbia of constitutional liability"); *Randolph v. Cervantes,* 130 F.3d 727, 730-31 (5th Cir. 1997) (rejecting substantive due process claim brought by mother of injured resident of state mental health center where state officials "allowed and encouraged [the resident] to voluntarily reside at [the center] . . .

having the right to come and go from the premises at any time"); *Uhlrig v. Harder,* 64 F.3d 567, 575 n.13 (10th Cir. 1995) (rejecting substantive due process claim brought by widow of municipal therapist killed by mental patient because therapist was aware of "potential risk inherent in [her] job" and declining "on a more general level" to hold "public employers liable ... for dangers arising from [such] risk"). *But see Estate of Phillips,* 257 F. Supp. 2d at 78-79 (finding that District of Columbia Fire Department's failure to train, equip and staff properly despite known danger shocks the conscience).

Given the relevant law, for Plaintiff to successfully evade dismissal of his substantive due process claim (Count I), he must (1) allege that Defendants' actions "shocked the conscience" and, (2) because deliberate indifference is asserted, allege facts supporting an inference that "special circumstances" exist to make such indifference "conscience shocking." Plaintiff has failed to allege the required special circumstances, and the vast majority of caselaw stands for the proposition that -- without custody -- such "special circumstances" do not exist. As the law currently stands, the danger inherent in the occupation of Postal employee is insufficient to create the special circumstances required by *Butera.* As the D.C. Circuit explained in *Fraternal Order of Police,*

> Prison guards, unlike the prisoners in their charge, are not held in state custody. Their decision to work as guards is voluntary. If they deem the terms of their employment

> unsatisfactory, *e.g.*, if salary, promotion prospects, or safety are inadequate, they may seek employment elsewhere. The state did not force [the plaintiff] to become a guard, and the state has no constitutional obligation to protect him from the hazards inherent in that occupation.

375 F.3d at 1146 (favorably quoting *Washington*, 802 F.2d at 1482). Based on the relevant test and law, the Court concludes that Plaintiff cannot show that Defendants' conduct in keeping the Brentwood Postal Facility open constituted the deprivation of an actual constitutional right. As such, the Plaintiff fails to meet the first prong of the qualified immunity test, and is unable to maintain an action under Count I.

b. Was the Right in Question "Clearly Established?"

The Court does point out that *Butera* might be read in a more expansive manner, as the *Butera* court did note that "[a]s in the context of State custody, the State also owes a duty of protection when its agents create or increase the danger to an individual." *Butera*, 235 F.3d at 652. Using this language, the Plaintiff might be able to claim that Defendants increased the danger to him by keeping the contaminated Facility open, and therefore violated a duty owed to him. However, the *Butera* court concluded that the contours -- and even the existence -- of this duty was far from being "sufficiently clear that a reasonable officer would

understand that what he [was] doing violate[d] that right." *Id.* (quoting *Anderson,* 483 U.S. at 640). Accordingly, the *Butera* petitioner's claim was foreclosed by qualified immunity.

> Upon examining relevant case law on the 'State endangerment' exception to *DeShaney,* we conclude that, in December 1997, [petitioner's] constitutional right to protection by the District of Columbia from third-party violence was not clearly established within the meaning of *Anderson,* First, as discussed, this circuit has never recognized constitutional liability in the context of a State endangerment claim, and the court in *Harris* intimated that it would construe narrowly the exception set forth in *DeShaney.* Furthermore, *LeShawn,* albeit in dictum, did not indicate any circumstance other than custody that would give rise to District of Columbia liability. Moreover, the only Supreme Court authority to support a State endangerment concept consisted of the oft-quoted dictum in *DeShaney,* which simply 'leaves the door open for liability' in this context....
>
> Second, as of 1997, the 'contours' of the rights created by the State endangerment concept were not settled among the circuits.

Id. (citations omitted).

An analysis of our circuit's post-*Butera* cases shows that a broad reading of the "State endangerment concept" is still far from "clearly established." Indeed, much of the labyrinthine caselaw and analysis in this area reminds the Court of the "riddle wrapped in mystery inside an enigma" confronted by Churchill. *Compare Fraternal Order of Police,* 375 F.3d at 1146-47 (indicating that employment alone will not merit the special circumstances necessary for conduct to "shock the conscience") *with Estate of Phillips,* 257 F. Supp. 2d at 78-79 (finding that a "deliberate indifference" case could be made in an employment situation). Therefore, assuming, *arguendo,* that Plaintiff could actually establish that his constitutional right to substantive due process was violated by the "shocking" misrepresentations and choices of Defendants, Plaintiff still cannot show that it was "clearly established" that Defendants would have been aware that their conduct was unlawful. Therefore, Plaintiff fails to meet the second prong of the qualified immunity test, ensuring that Count I must be dismissed.

2. Plaintiff's 5th Amendment Right to Equal Protection Under the Law

In Count II, Plaintiff asserts that "the workforce of the United States House of Representatives," which apparently is "less than 10% African American," was treated in a manner substantially different from Plaintiff and other workers at the Brentwood Postal Facility, whose

workforce is alleged to be "approximately 93% African American." First Am. Compl. ¶ 29. Due to race-based motivation,

> [i]nstead of immediately closing the Facility as were the House and Senate Office Buildings and providing antibiotics to employees, as was done with the House and Senate employees, the defendants repeatedly lied to the plaintiff and other postal workers at the Brentwood Facility about the dangers they faced.

Id. Plaintiff further claims that he "has alleged racial discrimination in its worst form ... as an African-American he was deemed expendable by defendants who valued the 'integrity' of the Post Office and $600,000 a day in revenue more than his life." Pl.'s Opp'n at 20-21. Likening himself to the African-American children challenging segregated schools in *Bolling v. Sharpe,* 347 U.S. 497 (1954), Plaintiff Richmond maintains that he suffered "invidious discrimination" because

> the black workforce at Brentwood was not told the truth, and the white workers on Capitol Hill were told the truth . . . the black workers at Brentwood were not immediately given medication to combat anthrax, and the white workers on Capitol Hill were ...

Pl.'s Opp'n at 21.

Plaintiff's Count II initially appears more promising than Count I for qualified immunity purposes. Once again, he does specifically allege "disparate treatment" that "shocks the conscience." First Am. Compl. ¶ 30. Moreover, the right to Equal Protection under the law regardless of race is certainly much more established than a substantive due process claim to life, safety and personal security in the workplace. *See Bolling,* 347 U.S. at 499-500 (the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating based on race).[7]

However, one fundamental problem undermines Plaintiff's ability to maintain an Equal Protection claim. While the First Amended Complaint explicitly alleges that Congress treated its employees in a manner different from the treatment afforded by the Postal Service to its workers, this assertion does not support Plaintiff's claim that Defendants themselves made race-based distinctions. To recover damages from a federal official in a *Bivens* case, a plaintiff must show that each named defendant actually engaged in conduct that violated the plaintiff's constitutional rights; a federal official cannot be held vicariously liable based upon the acts of other government officials. *Siegert,* 500 U.S. at 232. To satisfy this burden at the pleading stage, the plaintiff must allege the actual,

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[7] To state a claim under the Equal Protection component of the Fifth Amendment, intentional discrimination must be shown. *Washington v. Davis,* 426 U.S. 229, 239 (1976); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 270-71 & n.21 (1977).

personal participation in unconstitutional conduct of each defendant. *Rizzo v. Goode,* 423 U.S. 362, 371 (1976).

Plaintiff has not met this burden. Any cognizable Equal Protection claim must assert that Defendants afforded the "similarly situated" workers within their control disparate treatment based on race. The First Amended Complaint contains no allegation that Defendants had any role in or control over the decisions made with respect to Congress' employees. Based on Plaintiff's assertions in the First Amended Complaint, the only decision-making capacity Defendants had was with respect to the Brentwood Postal Facility. Plaintiff has made no allegation that Defendants Potter and Haney made any distinction between the African-American and non-minority workers in the Brentwood Facility: all workers at the Facility, African-American or white, were apparently exposed to the same dangers, regardless of race. The essence of Plaintiff's claim is that the Government treated Congressional employees differently than Brentwood Postal employees; while such a claim might have merit if the United States Government was a defendant, such a contention is not remotely sufficient to state a constitutional claim against Defendants Potter and

Haney.[8] Accordingly, Plaintiff has failed to state a claim for a violation of the Equal Protection component of the Fifth Amendment's Due Process guarantee, and dismissal is therefore warranted.

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[8] Defendants also argue that the Congressional employees were situated differently from the Postal employees. Defs.' Mot. at 11-12; Defs.' Reply at 4-5; *see also* First Am. Compl. ¶ 7 (sealed letter addressed to Senator Daschle was opened in the congressional offices; obvious exposure to anthrax found); *Id.* ¶ 8 (letter had merely "passed through" Brentwood Facility). The Defendants are relying upon the proposition that the Constitution "does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe,* 457 U.S. 202, 216 (1982) (quoting *Tigner v. Texas,* 310 U.S. 141, 147 (1940)); *accord Michael M. v. Superior Court,* 450 U.S. 464, 469 (1981). Indeed, "the dissimilar treatment of dissimilarly situated persons does not violate equal protection." *Women Prisoners of District of Columbia Dep't of Corrections v. District of Columbia,* 93 F.3d 910, 924 (D.C. Cir. 1996) (citations omitted). To back up their argument that the Capitol Hill workers were somehow "dissimilarly situated" from the Brentwood workers -- rendering Equal Protection concerns inapplicable -- Defendants once again attempt to introduce a panoply of scientific evidence and testimony concerning the risks of anthrax exposure. Defs.' Reply at 3 n.2, 4.

As discussed previously, *supra* note 5, the Court must only consider the facts alleged in the Complaint and all reasonable inferences therein. Defendants' testimony and analysis is therefore inappropriate and will be disregarded. Moreover, considering the constant comparisons made by Plaintiff between Congressional employees and Brentwood workers in his Complaint, as well as the general similarities (both groups were collections of federal employees, the same anthrax-filled letter passed through each workplace), the Court concludes that -- with all inferences in favor of Plaintiff as the non-moving party -- Plaintiff has established that the employees were "similarly situated." However, as discussed above, Plaintiff has not alleged that the named Defendants were responsible for the disparate treatment.

C. Special Factors Counseling Hesitation in Implying Bivens Action

1. Background and Recent Trends

In addition to the requirements that (1) a plaintiff name any defendants in their individual capacity and (2) overcome the defense of qualified immunity by displaying an abrogation of a "clearly established" constitutional right by the officials in question, a plaintiff must also (3) show that there are no "special factors counseling hesitation in the absence of affirmative action by Congress." *Schweiker v. Chilicky,* 487 U.S. 412, 421-22 (1988); *Bivens,* 403 U.S. at 396. In determining if such special factors are present, courts look to whether there exists an explicit statutory prohibition against the relief sought, or whether there is an available, alternative statutory remedy. *Id.* at 421. If such "special factors" do exist, then no *Bivens* action should be implied. *Malesko,* 534 U.S. at 69-70.

Bivens actions are an exceedingly rare legal breed whose extinction may well be nigh; "recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Chilicky,* 487 U.S. at 421; *see also Malesko,* 534 U.S. at 75 (Scalia, J, concurring in judgment) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . ."). Indeed,

> [i]n 30 years of *Bivens* jurisprudence [the Supreme Court has] extended its holding only twice, to provide an

> otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct.

Malesko, 534 U.S. at 70 (emphasis in original). According to the Supreme Court, a new right of action was inferred in *Davis v. Passman,* 442 U.S. 228 (1979), "chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation." *Malesko,* 534 U.S. 67 (citing *Davis,* 442 U.S. at 245 ("For Davis, as for Bivens, it is damages or nothing.")). In *Carlson v. Green,* 446 U.S. 14 (1980), the Supreme Court

> inferred a right of action against individual prison officials where the plaintiff's only alternative was a Federal Tort Claims Act (FTCA) claim against the United States . . . reason[ing] that the threat of suit against the United States was insufficient to deter the unconstitutional acts of individuals . . . [and] [finding] it 'crystal clear' that Congress intended the FTCA *and Bivens* to serve as 'parallel' and 'complementary' sources of liability.

Id. at 67-68 (citations omitted).

Since *Carlson,* the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Id.* at 68. This refusal to extend *Bivens* is a result of the current searching scrutiny given to whether alternative means of redress exist. *Bush v. Lucas,* 462 U.S. 367 (1983), fired the opening salvo in the judicial counter-revolution against *Bivens'* expansive implications. In *Bush,* the Supreme Court declined to create a *Bivens* remedy against individual Government officials for a First Amendment violation arising in the context of federal employment. Although the plaintiff had no opportunity to fully remedy the constitutional violation, the *Bush* court held that administrative review mechanisms crafted by Congress provided meaningful redress and thereby foreclosed the need to fashion a new, judicially crafted cause of action. Id. at 378, n.14, 386-88; *see Malesko,* 534 U.S. at 68 (discussing *Bush*). More importantly, the *Bush* court expressly recognized that Congress' institutional competence in crafting appropriate relief for aggrieved federal employees was a "special factor counseling hesitation in the creation of a new remedy." *Id.* at 380; *see also id.* at 389 ("Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees."). Following this reasoning, the Supreme Court reached a similar result in the military context, *Chappel v. Wallace,* 462 U.S. 296, 304 (1983), and even where the defendants were alleged to have been civilian personnel, *U.S. v. Stanley,* 483 U.S. 669, 681 (1987).

Schweiker v. Chilicky noted this trend away from *Bivens,* and saw the Supreme Court decline to infer a damages action against individual Government employees alleged to have violated due process in their handling of Social Security applications. *Chilicky,* 487 U.S. at 425-27. The *Chilicky* court found that "[t]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers for the violation." *Id.* at 421-22. Indeed, it did not matter that "[t]he creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed." *Id.* at 425; *see also Bush,* 462 U.S. at 388 (noting that "existing remedies do not provide complete relief for the plaintiff"); *Stanley,* 483 U.S. at 683 ("[I]t is irrelevant to a special factors analysis whether the laws currently on the books afford [plaintiff] ... an *adequate* federal remedy for his injuries . . . .") (emphasis added)).

The new rule, post-*Chilicky,* is that "[s]o long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separations of powers foreclose[] judicial imposition of a new substantive liability." *Malesko,* 534 U.S. at 69. This Circuit has reiterated these guidelines when analyzing potential *Bivens* actions. *See, e.g., Spagnola v. Mathis,* 859 F.2d 223, 229 (1988) (en banc) ("[I]t is quite clear that if Congress has 'not inadvertently' omitted damages against officials in the statute at issue, then courts must abstain from supplementing Congress' otherwise comprehensive relief scheme with *Bivens* remedies -- unless, of course, Congress has clearly expressed a preference that the judiciary

preserve *Bivens* remedies."); *Taylor v. FDIC,* 132 F.3d 753, 768 n.8 (D.C. Cir. 1997) ("We will not infer *a Bivens* remedy where Congress has created comprehensive procedural and substantive provisions giving meaningful remedies against the United States."); *Johnson v. Exec. Office for U.S. Attorneys,* 310 F.3d 771, 777 (D.C. Cir. 2002) ("It is clear that courts are precluded from granting such relief if the statute at issue provides a comprehensive scheme to administer public rights.") (citations omitted).

Correctional Services Corporation v. Malesko provided the capstone in the long, slow march to curtail *Bivens.* The *Malesko* court -- following the Supreme Court's refusal in *FDIC v. Meyer* to extend *Bivens* to permit suit against a federal agency, *Meyer,* 510 U.S. at 484-86 -- held that there was no implied private right of action, pursuant to *Bivens,* for damages against private entities that engaged in alleged constitutional violations while acting under color of federal law. *Malesko,* 534 U.S. at 74. Once again, the *Malesko* court noted that, even without *Bivens,* plaintiffs still had a myriad of "effective remedies." *Id.* at 72 ("It was conceded at oral argument that alternative remedies are at least as great, and in many respects greater, than anything that could be had under *Bivens.*"). According to the *Malesko* court, unless the alternative remedies present are "inconsistent or even hostile" to the remedy that would otherwise be inferred, a *Bivens* action will not lie. *Id.* at 73.

2. Application to Plaintiff Richmond's Claim

The quarter-century trend away from an expansive interpretation of *Bivens* certainly gives the Court pause when analyzing Plaintiff's claims. Moreover, unlike *Bivens, Davis,* and *Carlson,* Plaintiff has an alternative avenue available for redress -- the Federal Employee's Compensation Act ("FECA"), 5 U.S.C. § 8102, *et seq.* FECA allows a federal employee injured during the course of employment to receive worker's compensation, and is the *exclusive* remedy for these injured employees. *See* 5 U.S.C. § 8116(c) ("The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death is exclusive . . ."). If FECA is considered a "comprehensive" remedy, *Bush v. Lucas* and its progeny argue strongly against a creation of a *Bivens* action for Plaintiff Richmond.

Plaintiff attempts to circumvent the statutory language of FECA by arguing that one case in the Eastern District of New York -- handed down pre-*Bush, Chilicky,* and *Malesko* -- is still "on all fours." Citing to *Grichenko v. USPS,* 524 F. Supp. 672, 677 (E.D.N.Y. 1981), Plaintiff notes that the *Grichenko* court held:

> The defendants' assertion that the FECA precludes Grichenko's procedural due process claim is without merit. We do not find any special factors 'counseling hesitation' or suggesting inappropriateness of a *Bivens* type

> action ... In addition, while the FECA is Girchenko's exclusive remedy against the United States in seeking compensation for his eye injury, it does not provide an available, let alone substitute remedy for the constitutional violation asserted here."

Pl.'s Opp'n at 17 (quoting *Grichenko,* 524 F. Supp. at 677). Plaintiff then observes that a recent Second Circuit case, *Stuto v. Fleishman,* 162 F.3d 820, 826 (2d Cir. 1999), cited *Grichenko* "with approval," and therefore it should be good and controlling law. *Id.* A closer reading of *Stuto* reveals that Plaintiff is mistaken as to *Grichenko*'s implications. The *Stuto* court explained that "*Grichenko* involved conduct that foreclosed the administrative remedies of FECA, and therefore FECA's protections were unavailable." *Stuto,* 162 F.3d at 826. *Grichenko,* therefore, is no different from *Bivens, Davis,* or *Carlson:* it stands for the proposition that where no remedy whatsoever is available, a *Bivens* action may lie.

In the present case, however, FECA is still very much available to Plaintiff as a remedy. Plaintiff's protestations aside, it is clear that FECA represents a comprehensive remedial scheme created by Congress that precludes the creation of a *Bivens* action. *See, e.g., Cain v. Dunn,* Civ. No. 01-1862, slip. op. at *5 n.5 (D.D.C. Apr. 25, 2002) (Kotelly, J.) ("FECA . . . provides 'comprehensive procedural and substantive provisions giving meaningful remedies' to Plaintiff and, therefore, . . . a *Bivens* action is unavailable to Plaintiff in this

case."); *Caesar v. United States,* 258 F. Supp. 2d 1, 3 (D.D.C. 2003) (Sullivan, J.) ("The question of whether plaintiff's claims fall within the ambit of FECA, and are thus beyond this Court's jurisdiction, turns on whether [plaintiff] was injured while in the performance of his official duties") (citations omitted); *Turner v. Tenn. Valley Auth.,* 859 F.2d 412, 413 (6th Cir. 1988) ("The Supreme Court has consistently held that the FECA is the exclusive remedy employed by federal agencies and instrumentalities . . . .") (citing *Johansen v. United States,* 343 U.S. 427 (1952); *Patterson v. United States,* 359 U.S. 495 (1959) (per curium); *Lockheed Aircraft Corp. v. United States,* 460 U.S. 190, 193-94 (1983)); *Hightower v. United States,* 205 F. Supp. 2d 146, 155 (S.D.N.Y. 2002) ("By enacting both the CRSA and FECA within the field of federal employment, Congress has demonstrated a clear intent to foreclose the award of money damages against federal employees for constitutional violations that occur within the course of federal employment."). Moreover, FECA is clearly applicable to the injury suffered by Plaintiff: "all that is required is that the injury result from a risk incidental to the environment in which the employment places the claimant." *Caesar,* 258 F. Supp. 2d at 5.

Moreover, numerous other jurisdictions, when dealing with an allegation that a United States Postal Service ("USPS") employee suffered a constitutional deprivation during the course of employment, have specifically held that a *Bivens* action is not available. *See, e.g., Mitchell v. Chapman,* 343 F.3d 811, 825 (6th Cir. 2003) ("it is

well-settled that USPS employees may not allege *Bivens* claims arising out of their employment relationship with the USPS"); *Pipkin v. USPS,* 951 F.2d 272, 275-76 (10th Cir. 1991) ("Because Congress has provided a comprehensive procedure to address postal employees' constitutional claims arising from their employment relationship with the USPS, those arbitration procedures [in the FTCA] preclude plaintiffs' *Bivens* claims."); *Turner v. Holbrook,* 278 F.3d 754, 757 (8th Cir. 2002) (finding a *Bivens* action was not available to Postal worker due to access to grievance procedures provided by the Postal Reorganization Act); *Roman v. USPS,* 821 F.2d 382, 386 (7th Cir. 1987) (collective bargaining agreement created binding grievance process for USPS employees and precluded ability of postal employees to bring claims "directly under the due process clause"); *McCollum v. Bolger,* 794 F.2d 602, 607 (11th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987) (same); *Broussard v. v. USPS,* 67 4 F.2d 1103, 1112 (5th Cir. 1982) (no *Bivens* claim against USPS supervisors); *Pereira v. USPS,* 964 F.2d 873, 876 (9th Cir. 1992) (denying plaintiff's *Bivens* claim against USPS supervisors because of comprehensive arbitration scheme); *Harding v. USPS,* 802 F.2d 766, 767-68 (4th Cir. 1986) (same).

Given the availability of FECA, the existence of possible other remedies outside of FECA,[9] and the weight of persuasive authority suggesting that USPS employees may not use *Bivens* for constitutional claims arising out of the workplace, the Court concludes that a comprehensive remedial scheme outside of a *Bivens* action is available to Plaintiff. Following *Bush, Chilicky,* and *Malesko,* this Court finds that the existence of an alternative remedial scheme for Plaintiff creates a "special factor" guarding against the imposition of a *Bivens* action against his superiors at the USPS. As such, Plaintiff's action must be dismissed, and judgment on the pleadings must be entered for Defendant.

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[9] To the extent that FECA might not cover Plaintiff's racial discrimination claim, the law is quite clear that Title VII of the 1964 Civil Rights Act is the exclusive remedy for discrimination by the government on the basis of race, religion, sex, or national origin. 42 U.S.C. § 2000e-16; *Brown v. Gen. Serv. Admin.,* 425 U.S. 820, 835 (1976); *Kizas v. Webster,* 707 F.2d 524, 544-45 (D.C. Cir. 1983); *Briones v. Runyon,* 101 F.3d 287, 289 (2d Cir. 1996); *Boyd v. USPS,* 752 F.2d 410, 413-14 (9th Cir. 1985); *Newbold v. USPS,* 614 F.2d 46, 47 (5th Cir. 1982). To maintain a suit under Title VII, a plaintiff must meet certain time requirements and must exhaust his remedies under the statute. *Kizas,* 707 F.2d at 544. The Court makes no determination of whether Plaintiff has met the criteria for a successful Title VII suit, and only notes that Title VII possibly provides yet another avenue of redress outside of *Bivens.* Even if Title VII is unavailable for procedural reasons, the *Bush* court noted that a *Bivens* action should not be implied simply because "existing remedies do not provide complete relief for the plaintiff." *Bush,* 462 U.S. at 388. Rather, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Chilicky,* 487 U.S. at 423.

IV: CONCLUSION

For the reasons stated above, the Court finds that Defendants' Motion for Judgment on the Pleadings must be granted. The Court does note that Plaintiff may well have a plethora of alternative remedies with which he may attempt to seek redress from either his superiors or the Government itself, presuming that any future attempt by Plaintiff falls within the statute of limitations and any statutory requirements. The hurdles created by qualified immunity and the *Bivens* "special factor" test, however, doom this attempt at recourse to failure. An Order accompanies this Memorandum Opinion.

Date: September 30, 2004

/s/

COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

LEROY RICHMOND
6 Justin Court
Stafford, Virginia 22554

Plaintiff, Civil Action No. 1: 03CV00018

v. Judge(CKK)

JOHN "JACK" POTTER
Postmaster General of the U.S Postal Service
U.S. Postal Service
475 L'Enfant Plaza
Washington, D.C. 20260

and

TIMOTHY HANEY
Plant Manager, Brentwood Facility
U.S. Postal Service
475 L'Enfant Plaza
Washington, D.C. 20260

and

PAULETTE COLLETTE
Postmaster, Washington D.C.
U.S. Postal Service
475 L'Enfant Plaza
Washington, D.C. 20260

Defendants.

[ENTERED: OCTOBER 10, 2003]

FIRST AMENDED COMPLAINT

INTRODUCTION

1. This is a civil action brought pursuant to the 5th Amendment to the United States Constitution for committing acts which violated plaintiff's rights secured underthe Constitution and the laws of the United States.

JURISDICTION

2. Jurisdiction exists in this case pursuant to the Fifth Amendment to the Constitution and under 28 U.S.C. §1343.

PARTIES

3. Plaintiff Leroy Richmond was at all times relevant herein, a resident and citizen of the Commonwealth of Virginia and an employee at the Brentwood Postal Facility in northeast Washington, D.C.

4. Defendant John "Jack" Potter, was at all times relevant herein, the Postmaster General of the United States. He is sued in his individual capacity.

5. Defendant Timothy Haney, was at all times relevant herein, the Plant Manager at the Brentwood Postal Facility and is sued in his individual capacity.

6. Defendant Paulette Collette, was at all times relevant herein, the Postmaster for Washington, D.C. with direct responsibility for the Brentwood Postal Facility and is sued in her individual capacity.

STATEMENT OF RELEVANT FACTS

7. On or about October 15, 2001, a letter addressed to Senator Tom Daschle was opened by one of his staffers and discovered to contain a white powder substance. That substance was determined to be anthrax. As a result of this discovery, Senator Daschle's staffers were immediately administered the drug Cipro and provided other appropriate medical care. In addition, shortly thereafter the House and Senate recessed, their buildings were closed and remedial activities undertaken. Until the safety of the worker's on Capitol Hill could be reasonably assured, Capitol Hill workers were not required to report to work. Accordingly, no employees of the House or Senate contracted inhalation anthrax.

8. The defendants discovered that the letter contaminated with anthrax and addressed to Senator Tom Daschle, had passed through the Brentwood Postal Facility on October 12, 2001. The defendants further became aware of the approximate time that this letter passed through the facility and through which specific sorter it had passed. In direct contrast to the actions initiated with respect employees of the House and Senate, the defendants took no action with regard to postal employees at the Brentwood Facility.

9. On October 16, 2001, the plaintiff reported to work as usual. During his tour of duty, he was asked to read a safety bulletin to other Postal workers in which assurances were given about the safety of the Brentwood Facility. On Capitol Hill, medical personnel conducted nasal swaps of more than a thousand people and dispensed antibiotics. House leaders took the historic step of cancelling floor action and then closed its office buildings. The Senate basically followed suit. The plaintiff left work at the end of his shift at 12:30 p.m. and headed home. He had developed a cough that was worsening.

10. On October 17, 2001, the plaintiff again reported to work as normal. The defendants still had taken no action regarding the safety of the plaintiff or the other postal employees at the Brentwood Facility. Again, the employees at the facility were assured of the safety of the Brentwood Facility even though the defendants had no basis at all to advance that position and even though the plaintiff and several of his colleagues were already infected by the anthrax that had been introduced into the Brentwood Facility by the Daschle letter and were literally dying. When asked by postal employees about closing the Brentwood Facility as a precaution, the defendants first responded that closing the Brentwood Facility was not an option because it would cost the Postal Service approximately $600,000,000.00 a day, and then once again falsely represented that there was no contamination in the Brentwood Facility.

11. On October 18, 2001, the plaintiff again reported to work as usual although he had truly begun to feel ill. Ironically, the plaintiff was tapped to set up a news conference for government officials, including the defendants, to once more falsely assure the public of the alleged safety of the Brentwood Facility. These false proclamations of a safe working environment at the Brentwood Facility had no basis in fact or science and were merely set forth so as not to panic the public and disrupt the mail in the nation's capitol. The workers at the Brentwood Facility, and the plaintiff in particular, were deemed expendable. The defendants had made a conscious decision to keep the workers at the Brentwood Facility in the dark about the risks they faced as long as they could in their misguided attempt to preserve their perceived integrity of the Postal Service.

12. By October 19, 2001, the plaintiff's condition had considerably worsened and he had become very concerned. Nonetheless, he reported to work as usual. Later that morning, he went to see the nurse at the Brentwood Facility who referred him to his private doctor. The defendants still took no action regarding worker's at the Brentwood Facility. Subsequently that same day, plaintiff was preliminarily diagnosed with inhalation anthrax at Fairfax Inova Hospital. The initial diagnosis of inhalation anthrax was confirmed at approximately 7:00 a.m. on October 20, 2001.

13. Even though plaintiff's diagnosis of inhalation anthrax was confirmed, and the defendants were made aware of that fact almost

immediately, they still made no efforts to warn postal employees at the Brentwood Facility; they still made no effort to get antibiotics to the workers at the Brentwood Facility; and they continued to refuse to close the Brentwood Facility so as to assure that no other postal workers were infected.

14. More than 24 hours later, on October 21, 2001, the defendants finally decided that the workers at the Brentwood Facility deserved to be told the truth about the plaintiff being infected with inhalation anthrax as a result of his employment at the Facility. It was not until the following day, October 22, 2001, that the defendants abandoned their indifferent attitude toward the postal workers at the Brentwood Facility, and did that which they should have done on October 15, 2001, which was to close the Brentwood Facility, and make antibiotics available to their employees.

15. Unfortunately, by the time the defendants decided that the postal workers at the Brentwood Facility, even though they were mostly African American and middle class, were deserving of humane and equal treatment, the plaintiff was in a hospital bed, where he would remain for about a month, desperately fighting for his life. For plaintiff's friends, Joseph Curseen and Thomas Morris, the defendants' abandoned indifference came too late, they died of inhalation anthrax.

COUNT I
(Fifth Amendment-Life, Safety and Personal Security)

16. Plaintiff adopts and incorporates the allegations of complaint ¶¶ 1 -15 as if fully set forth herein.

17. This Count arises under the Fifth Amendment to the United States Constitution, and is alleged against the defendants in their individual capacities, jointly and severally.

18. At all times relevant herein, the defendants were employed as officials of the United States Postal Service.

19. At all times relevant herein, the plaintiff enjoyed the protections of the Fifth Amendment to the United States Constitution, which prohibits inter alia deprivation of the rights to life, safety and personal security.

20. Throughout the period referenced herein, the defendants were subject to the constitutional obligation not to deprive the plaintiff of his rights to life, safety and personal security.

21. By their outrageous and unconscionable conduct of causing the plaintiff to become infected by inhalation anthrax, the defendants acted with conscious shocking deliberate indifference to the rights of the plaintiff in subjecting him to the known, substantial risk of serious harm, and specifically death.

22. In causing the plaintiff to be infected with inhalation anthrax, each of the defendants took affirmative actions in concert with one another to conceal the danger at the Brentwood Facility from the plaintiff and the other postal workers at that Facility. The defendants' actions in this regard included but were not limited to false representations, baseless representations and self-serving representations designed to keep the Brentwood Facility fully operational.

23. As a direct and proximate result of the above-referenced outrageous conduct, the plaintiff nearly lost his life, suffered extreme and horrific pain and suffering, severe emotional distress, mental anguish, embarrassment, and humiliation.

Wherefore, plaintiff demands judgment against the defendants, jointly and severally, in the full and fair amount of Fifty Million Dollars ($50,000,000.00) plus interest and costs.

COUNT II
(Fifth Amendment-Equal Protection)

24. Plaintiff adopts and incorporates the allegations of complaint ¶¶ 1 -15 as if fully set forth herein.

25. This Count arises under the Fifth Amendment to the United States Constitution, and is alleged against the defendants in their individual capacities, jointly and severally.

26. At all times relevant herein, the defendants were employed as officials of the United States Postal Service.

27. At all times relevant herein, the plaintiff enjoyed the protections of the Fifth Amendment to the United States Constitution, which prohibits inter alia deprivation of the right to equal protection under the law.

28. Throughout the period referenced herein, the defendants were subject to the constitutional obligation not to deprive the plaintiff of his right to equal protection under the law.

29. The workforce at the Brentwood Facility is approximately 93% African American. The workforce of the United States House of Representatives is less than 10% African American. Once the anthrax laden letter addressed to Senator Daschle was discovered, immediate action was taken to assure the safety of the workers in the House and Senate. Accordingly, no House or Senate worker contracted inhalation anthrax.

29. Because the workers at the Brentwood Facility were 93% African American and deemed expendable by the defendants, the defendants falsely represented that the Brentwood Facility was not contaminated, even though they had no basis for such a representation. Instead of immediately closing the Facility as were the House and Senate Office Buildings and providing antibiotics to its employees, as was done with the House and Senate employees, the defendants repeatedly lied to the

plaintiff and other postal workers at the Brentwood Facility about the dangers they faced.

30. As a result of the outrageous and despicable disparate treatment which the defendants caused the plaintiff to be subjected to, which on its face shocks the conscious, the plaintiff was infected with inhalation anthrax in direct contravention of his rights to equal protection under the law by the Fifth Amendment to the United States Constitution.

31. As a direct and proximate result of the above-referenced outrageous conduct, the plaintiff nearly lost his life suffered extreme and horrific pain and suffering, severe emotional distress, mental anguish, embarrassment, and humiliation.

Wherefore, plaintiff demands judgment against the defendants, jointly and severally, in the full and fair amount of Fifty Million Dollars ($50,000,000.00) plus interest and costs.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Respectfully submitted,

Gregory L. Lattimer[371926]
1200 G Street, N.W.
Suite 800
Washington, DC 20005
(202) 434-8940

Elmer Douglas Ellis[423276]
909 U Street, N.W.
Suite 300
Washington D.C. 20001
(202) 789-1975